LOKHMAN ABU

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
[CRIMINAL APPEAL NO: P-09-17-96]
28 NOVEMBER 2000

CRIMINAL PROCEDURE: *Appeal - Failure of justice - Section 257(1) Criminal Procedure Code not complied with - Voluntariness of caution statement uncertain - Whether amounts to failure of justice - Whether conviction safe - Whether High Court right in enhancing sentence*

The complaint in this appeal was that the main points of the prosecution case were not explained to the appellant as required by s. 257(1) Criminal Procedure Code.

Held:
Per Gopal Sri Ram JCA

[1] There was a clear breach of s. 257(1) Criminal Procedure Code. The way the caution statement was introduced was unsatisfactory. In a case where an accused is unrepresented, and a caution statement is sought as evidence, the court must determine from the accused whether he accepts that it was made voluntarily.

[2] In this appeal, however, there was no miscarriage of justice and the conviction was safe from any tainted evidence.

[3] The learned judge erred in enhancing the sentence in plain disregard of the provisions of s. 323 Criminal Procedure Code.

[Appeal against conviction dismissed; enhanced sentence imposed by High Court set aside and sentence of Sessions Court restored.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Aduan dalam kes rayuan ini adalah mengenai perkara fakta yang terdapat di dalam kes pendakwaan yang tidak diterangkan ke perayu seperti yang dikehendaki oleh s. 257(1) Kanun Prosedur Jenayah.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Ada berlakunya perlanggaran s. 257(1) Kanun Prosedur Jenayah. Pernyataan beramaran yang telah diberikan tidak memadai. Di dalam kes di mana tertuduh tidak diwakili oleh seorang peguambela, dan pernyataan beramaran diberi sebagai keterangan, mahkamah mestilah mendapat penentuan dari tertuduh samada tertuduh menerimanya sebagai pernyataan beramaran yang dibuat secara sukarela.

[2] Di dalam kes rayuan ini, mahkamah berpuas hati bahawa tidak terdapat kesalahan perlaksanaan keadilan dan sabitan terselamat dari keterangan yang mencemarkan.

[3] Didapati bahawa hakim yang bijaksana salah dalam meninggikan hukuman tanpa mengendahkan peruntukan yang terdapat di s. 323 Kanun Prosedur Jenayah.

[Rayuan menentang sabitan ditolak; peninggian hukuman yang dijatuhkan oleh Mahkamah Tinggi diketepikan dan hukuman yang dijatuhkan oleh Mahkamah Sesyen dipulihkan.]

Case(s) referred to:
Juraimi Hassan v. PP [1998] 2 CLJ 383 ***(refd)***
Lim Chow Keng v. PP [1973] MLJ 156 ***(foll)***
Ratten v. R [1974] 1 CLR 510 ***(refd)***
Shaari v. PP [1963] MLJ 22 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, ss. 257(1), 323, 422

For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Zauyah Bee Loth Khan DPP

[Appeal from High Court, Pulau Pinang; Criminal Application No: 42-188-95]

Reported by Suhainah Wahiduddin

JUDGMENT

Gopal Sri Ram JCA:

The substance of the complaint in this appeal is that the main points of the prosecution case were not explained to the appellant as required by s. 257(1) of the Criminal Procedure Code. There is abundant authority in support of the proposition that a departure from the provisions of the Criminal Procedure Code is a ground upon which an appellate court may intervene.

There is however an important qualification to that rule. It is that the power is not exercisable if there is no miscarriage of justice; or a 'failure of justice' – the phrase employed by s. 422 of the Criminal Procedure Code.

The provision to s. 422 of the Criminal Procedure Code is in *pari materia* with the proviso to s. 60 of the Courts of Judicature Act 1964. Both these sections have received judicial treatment. It is now settled that if there is sufficient evidence to warrant the conviction that would be a good ground for holding that there was no miscarriage or failure of justice.

In *Juraimi bin Hassan v. Public Prosecutor* [1998] 2 CLJ 383, this court had occasion to apply the following dictum of Barwick CJ in *Ratten v. R* [1974] 1 CLR 510, at 586:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. *It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind.* But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration. (emphasis added)

Much the same approach was adopted by *Shaari v. Public Prosecutor* [1963] MLJ 22, where, at p. 23, the learned judge said:

> In the case before me, the accused was able, as shown in the evidence, to explain the evidence given and in my opinion, if the Magistrate had accepted his denial of the knowledge of the bananas he would be acquitted. In other words, though the Magistrate had failed to explain the main points of the evidence against the appeal, he was able in his defence to give an intelligent reply.
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> I would, therefore, although section 257 of the Criminal Procedure Code did appear at first sight to be mandatory by reason of the words "shall call his attention", I would say that having regard to what had taken place subsequent to that the accused had not been prejudiced in his defence and would, therefore, say that in the present case the failure by the Magistrate to comply with the provision of the section had not occasioned any prejudice or a reasonable probability of prejudice but is an omission curable under section 422 of the Criminal Procedure Code.

We have examined the record in the present case with much anxiety. We are in agreement with Mr. Karpal Singh that there was a clear breach of s. 257(1) of the Criminal Procedure Code. We are also in agreement with him that the way in which the cautioned statement was introduced was unsatisfactory. In our judgment, in a case where an accused is unrepresented, it is desirable in the interests of justice, when a cautioned statement is sought to be introduced in evidence, for the court at that stage to ascertain from the accused whether he accepts that it was made voluntarily. If he does not, then the court should proceed to conduct a trial within a trial to determine the admissibility of the statement in accordance with settled principles.

The failure to do so would attract different consequences in each case, according to its own facts. In our case, having scrutinised the evidence, we are satisfied that there has not been a miscarriage of justice or to borrow the words of s. 422 of the Criminal Procedure Code, a failure of justice. Having satisfied ourselves that the conviction is safe from any tainted evidence we find it unnecessary for the respondent to reply.

In the circumstances, the appeal against conviction is dismissed.

Having invited counsel for the appellant to submit on the issue of sentence, we agree that the learned judge of intermediate appeal erred in enhancing the sentence in plain disregard of the provisions of s. 323 of the Criminal Procedure Code. See *Lim Chow Keng v. Public Prosecutor* [1973] MLJ 156.

In the circumstances, we intervene and set aside the sentence imposed by the High Court and restore the sentence imposed by the Sessions Court.

My learned brothers Mokhtar Sidin and Abdul Kadir Sulaiman JJCA, concur with this judgment.